A

Nikodemus ak Singai & Ors v Indranika Jaya Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(NCvC)(W)-1563–07 OF 2018
LEE SWEE SENG, SUPANG LIAN AND GUNALAN MUNIANDY JJCA
10 JANUARY 2023

C

Land Law — Trespass — Native customary rights ('NCR') over land — Respondent as registered lessee of land was granted injunction and awarded nominal damages against appellants — Whether NCR of appellants over land may co-exist with interest of respondent — Whether appellants' NCR over land had been surrendered, terminated and extinguished — Whether nominal damages for trespass should be set aside — Whether injunction should remain — Whether court may declare title issued to be null and void for non-compliance with law

D

In 2007 the natives Iban in Nikodemus ak Singai and others ('the natives') in a representative action filed a suit in the High Court seeking reliefs of various declarations, inter alia, that they had native customary rights ('NCR') over the disputed land and that the alienation of the disputed land to the companies named in the suit and, in particular for the purpose of this appeal, to the respondent ie Indranika Jaya Sdn Bhd ('Indranika Jaya'), was unlawful and that the issuance of the provisional leases were unlawful and null and void and the relevant entries of the registration of the subject land in the company's name be expunged ('the Nikodemus NCR 2007 Suit'). At the time the natives filed the Nikodemus NCR 2007 Suit, the leases issued were provisional leases over the subject land and subsequently these were converted into final State leases. Indranika Jaya had entered into possession of the subject land being issued with a title in 2003 and had planted and cultivated an oil palm plantation on the subject land which had been bearing fruits for several years. After the decision in the Nikodemus NCR 2007 Suit in which the High Court decided in the natives' favour, the natives entered upon the subject land and sought to blockade the lorries from entering and exiting the oil palm plantation. The natives maintained that they had a right to remain on the subject land as they had NCR over the whole of the disputed land which included the subject land and which NCR had not been properly terminated nor had it been extinguished and as yet, there had been no assessment of damages paid to them. Indranika Jaya filed a suit in the High Court ('the Indranika Jaya trespass 2016 Suit'), claiming damages for trespass and an injunction restraining the natives from blocking the lorries from so entering and exiting the oil palm plantations and from trespassing on the subject land. The injunction was granted and nominal damages of RM20,000 was awarded. Hence, this appeal by the natives

E

F

G

H

I

and cross-appeal by Indranika Jaya. The issues for consideration were: (a) whether the NCR of the natives over the land may co-exist with the interest of the registered lessee in the provisional lease and later State lease; (b) whether the natives' NCR over the subject land had been surrendered, terminated and extinguished under the law; (c) whether the sum of RM20,000 assessed as nominal damages for trespass should be set aside; (d) whether the injunction should remain; and (e) whether there may be circumstances where the court may declare a title issued to be null and void for non-compliance with the law by the State and its agencies.

Held, allowing the appellants' appeal and dismissing respondent's cross-appeal:

(1) The three titles to the three provisional leases were issued on 14 March 2008 and the final State leases were issued on 12 October 2009 even without the completion of a survey. As stated in the amended s 28(4) of the Sarawak Land Code ('the SLC') it was unless and until both conditions were fulfilled ie that the final survey was completed to the satisfaction of the Superintendent and a State lease in Form B was issued that the title became indefeasible for otherwise the benefit of indefeasibility under s 132 of the SLC did not follow nor flow from what was essentially a provisional lease still since it was subjected to the completion of the survey. An NCR over the subject land may not defeat indefeasibility of the State lease but that did not mean that the holder of the State leases had been conferred an automatic right to claim for trespass over natives who had NCR over the subject land. The express restriction and special conditions attached to the land as found in the final State lease was such that the indefeasibility of the lease was not absolute but qualified and in any event the natives had been found by the High Court to have been legally on the land even before 1 January 1958 and that they had not abandoned their NCR land. As both NCR and benefits of indefeasibility may exist side by side over the disputed land and more particularly the subject land for the discussion of this appeal on Indranika Jaya's trespass suit, neither could sue the other for trespass. As such, the lessee of the State lease, Indranika Jaya, could not maintain an action for trespass against the natives (see paras 45, 51 & 86–89).

(2) Unless and until damages in the form of compensation was paid, the NCR over the disputed land had not been extinguished. It would be detrimental and unfair to the natives to take the date of extinguishment of their NCR to be anything earlier than the final disposal of their rights in the Federal Court. When the Indranika Jaya's trespass 2016 Suit was before the High Court, the natives' NCR over the disputed land had not been extinguished with the result that both rights, subsisting and co-existing, Indranika would not be able to mount and maintain an action in trespass against the natives. The case of *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273

was not being read as laying down the proposition that in every case the court would have to say to the natives that it was too late for them to assert any NCR over the land and must be content with just awaiting compensation whilst private enterprise had already monetised the land by using it as a security for loans (see paras 110, 112–113 & 115).

(3) As a cause of action in trespass could not be had against the natives as they had NCR over the subject land subsisting and co-existing side by side the registered lease interest of Indranika Jaya as the lessee, it would mean that no liability could be found against the natives. Any damages, even nominal damages, was not justified. Unless and until compensation was paid out and in the absence of a declaration as to when their NCR rights had been extinguished, any finding of trespass and an award of damages, even nominal, would aggravate the anomaly and aberration in the granting of a State lease before the NCR over the subject land had been lawfully surrendered, terminated or extinguished (see paras 118 & 124–125).

(4) While the natives' NCR over the land had not been lawfully surrendered, terminated or extinguished, it would nevertheless not be conducive for peace and the orderly conduct of business if the injunction granted was not continued as there might be a breach of the peace. What the appellants suffered as a result of their NCR over the land not having been lawfully terminated and extinguished would have to be taken up in the damages claim against the State and its agencies and for at the same time being deprived of being able to exercise their NCR over the land while waiting for compensation to be assessed and paid out (see paras 126–127).

(5) There would be circumstances where the court would not shrink from declaring a title issued not in compliance with its own procedure was ultra vires the relevant Land Code. To say in that circumstance that the title issued to a third party, being indefeasible, could not be touched, tinkered with and much less impugned and rectified, and that all that the traumatised proprietor could do was to await compensation from the State would be cold comfort and more so when the State had an exit route endorsed on the State lease. Likewise, it would be unconstitutional for a State to alienate any NCR land without payment of compensation. The subsequent order for payment of compensation by the court did not make the act of the State in depriving the appellant of their NCR land without payment of compensation a constitutional act (see paras 130 & 137–138).

[Bahasa Malaysia summary

Pada tahun 2007 orang asli Iban melalui Nikodemus ak Singai dan lain-lain ('orang asli') dalam tindakan perwakilan memfailkan saman di Mahkamah

Tinggi memohon relif pelbagai pengisytiharan, antara lain, bahawa mereka mempunyai hak adat anak negeri ('HAAN') ke atas tanah yang dipertikaikan dan bahawa pemberian tanah yang dipertikaikan kepada syarikat yang dinamakan dalam saman itu dan, khususnya untuk tujuan rayuan ini, kepada responden iaitu Indranika Jaya Sdn Bhd ('Indranika Jaya'), adalah menyalahi undang-undang dan bahawa pengeluaran pajakan sementara adalah menyalahi undang-undang dan terbatal dan tidak sah dan penyertaan berkaitan pendaftaran tanah subjek atas nama syarikat akan dihapuskan ('Saman Nikodemus HAAN 2007'). Pada masa orang asli memfailkan Saman Nikodemus HAAN 2007, pajakan yang dikeluarkan adalah pajakan sementara ke atas tanah subjek dan seterusnya ini telah ditukar kepada pajakan Negeri muktamad. Indranika Jaya telah memasuki pemilikan tanah subjek dengan hakmilik pada tahun 2003 dan telah menanam dan mengusahakan ladang kelapa sawit di atas tanah subjek yang telah berbuah selama beberapa tahun. Selepas keputusan dalam Saman Nikodemus HAAN 2007 di mana Mahkamah Tinggi memutuskan untuk memihak kepada orang asli, orang asli memasuki tanah subjek dan berusaha untuk menyekat lori daripada masuk dan keluar dari ladang kelapa sawit. Orang asli bertegas bahawa mereka mempunyai hak untuk kekal di tanah subjek kerana mereka mempunyai HAAN ke atas keseluruhan tanah yang dipertikaikan termasuk tanah subjek dan HAAN belum ditamatkan dengan betul dan tidak dihentikan dan setakat ini, terdapat tiada taksiran ganti rugi yang dibayar kepada mereka. Indranika Jaya memfailkan saman di Mahkamah Tinggi ('Saman pencerobohan Indranika Jaya 2016'), menuntut ganti rugi untuk pencerobohan dan injunksi yang menghalang orang asli daripada menghalang lori masuk dan keluar dari ladang kelapa sawit dan daripada menceroboh tanah subjek. Injunksi itu dibenarkan dan ganti rugi nominal RM20,000 telah diberikan. Oleh itu, rayuan ini oleh orang asli dan rayuan balas oleh Indranika Jaya. Isu-isu untuk pertimbangan adalah: (a) sama ada HAAN orang asli ke atas tanah mungkin wujud bersama kepentingan pemajak berdaftar dalam pajakan sementara dan kemudiannya pajakan Negeri; (b) sama ada HAAN orang asli ke atas tanah subjek telah dikalahkan, ditamatkan dan dihentikan di bawah undang-undang; (c) sama ada jumlah RM20,000 yang dinilai sebagai ganti rugi nominal untuk pencerobohan perlu diketepikan; (d) sama ada injunksi harus kekal; dan (e) sama ada terdapat keadaan di mana mahkamah boleh mengisytiharkan hak milik yang dikeluarkan sebagai terbatal dan tidak sah kerana tidak mematuhi undang-undang oleh Negeri dan agensinya.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan balas responden:

(1) Tiga hakmilik kepada tiga pajakan sementara telah dikeluarkan pada 14 Mac 2008 dan pajakan Negeri muktamad telah dikeluarkan pada 12 Oktober 2009 walaupun tanpa penyiapan ukur. Seperti yang dinyatakan dalam pindaan s 28(4) Kanun Tanah Sarawak ('KTS') ia

adalah melainkan dan sehingga kedua-dua syarat dipenuhi iaitu ukur muktamad telah disiapkan untuk memuaskan hati Penguasa dan pajakan negeri dalam Borang B telah dikeluarkan bahawa hakmilik menjadi tidak boleh disangkal kerana jika tidak kepentingan ketakbolehsangkalan di bawah s 132 KTS tidak diikuti atau mengalir daripada apa yang pada asasnya adalah pajakan sementara kerana ia tertakluk kepada penyiapan ukur. Satu HAAN ke atas tanah subjek mungkin tidak mengalahkan ketakbolehsangkalan pajakan negeri tetapi itu tidak bermakna bahawa pemegang pajakan negeri telah diberikan hak automatik untuk menuntut pencerobohan ke atas anak negeri yang mempunyai HAAN ke atas tanah subjek. Sekatan nyata dan syarat khas yang dilampirkan pada tanah seperti yang terdapat dalam pajakan Negeri muktamad adalah sedemikian rupa sehingga ketakbolehsangkalan pajakan itu tidak mutlak tetapi layak dan dalam apa jua keadaan orang asli telah didapati oleh Mahkamah Tinggi adalah secara sah di atas tanah itu walaupun sebelum 1 Januari 1958 dan bahawa mereka tidak meninggalkan tanah HAAN mereka. Memandangkan kedua-dua HAAN dan faedah ketakbolehsangkalan boleh wujud bersama di atas tanah yang dipertikaikan dan terutamanya tanah subjek untuk perbincangan rayuan ini mengenai Saman pencerobohan Indranika Jaya, kedua-dua pihak tidak boleh menyaman antara lain atas pencerobohan. Oleh itu, pemajak pajakan Negeri, Indranika Jaya, tidak dapat mengekalkan tindakan menceroboh anak negeri (lihat perenggan 45, 51 & 86–89).

(2) Melainkan dan sehingga ganti rugi dalam bentuk pampasan dibayar, HAAN ke atas tanah yang dipertikaikan belum dihentikan. Adalah memudaratkan dan tidak adil kepada orang asli untuk diambil tarikh pemberhentian HAAN mereka sebagai sesuatu yang lebih awal daripada pelupusan terakhir hak mereka di Mahkamah Persekutuan. Apabila Saman pencerobohan Indranika Jaya 2016 dihadapkan ke Mahkamah Tinggi, HAAN orang asli ke atas tanah yang dipertikaikan tidak dihentikan dengan keputusan bahawa kedua-dua hak, wujud dan wujud bersama, Indranika tidak akan dapat melakukan dan mengekalkan tindakan pencerobohan terhadap orang asli. Kes *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273 tidak dibaca sebagai meletakkan cadangan bahawa dalam setiap kes mahkamah perlu mengatakan kepada orang asli bahawa sudah terlambat bagi mereka untuk menegaskan mana-mana HAAN ke atas tanah dan mesti berpuas hati dengan hanya menunggu pampasan sementara perusahaan swasta telah pun menghasilkan wang dengan tanah dengan menggunakannya sebagai jaminan untuk pinjaman (lihat perenggan 110, 112–113 & 115).

(3) Oleh kerana kausa tindakan pencerobohan tidak boleh dibuat terhadap orang asli kerana mereka mempunyai HAAN ke atas tanah subjek yang wujud dan wujud bersama dengan kepentingan pajakan berdaftar

Indranika Jaya sebagai pemajak, ini bermakna tiada liabiliti boleh didapati terhadap orang asli. Sebarang ganti rugi, malah ganti rugi nominal, adalah tidak wajar. Melainkan dan sehingga pampasan dibayar dan tanpa adanya pengisytiharan tentang bila hak HAAN mereka telah dihentikan, sebarang penemuan pencerobohan dan award ganti rugi, walaupun nominal, akan memburukkan lagi keganjilan dan penyelewengan dalam pemberian pajakan Negeri sebelum HAAN ke atas tanah subjek telah secara sah diserahkan, ditamatkan atau dihentikan (lihat perenggan 118 & 124–125).

(4) Walaupun HAAN orang asli ke atas tanah itu tidak secara sah diserahkan, ditamatkan atau dipadamkan, namun ia tidak sesuai untuk keamanan dan kelancaran perniagaan jika injunksi yang diberikan tidak diteruskan kerana mungkin berlaku pelanggaran kedamaian. Apa yang ditanggung oleh perayu akibat HAAN mereka ke atas tanah yang tidak secara sah ditamatkan dan dihentikan perlu diambil kira dalam tuntutan ganti rugi terhadap Negeri dan agensinya dan pada masa yang sama dihalang untuk melaksanakan HAAN atas tanah sementara menunggu pampasan dinilai dan dibayar (lihat perenggan 126–127).

(5) Akan ada keadaan di mana mahkamah tidak akan mengelak daripada mengisytiharkan hakmilik yang dikeluarkan tidak mematuhi prosedurnya sendiri adalah ultra vires Kanun Tanah yang berkaitan. Untuk mengatakan dalam keadaan itu bahawa hakmilik yang dikeluarkan kepada pihak ketiga, tidak boleh disangkal, tidak boleh disentuh, dikaji dan lebih-lebih lagi disangkal dan diperbetulkan, dan bahawa apa yang boleh dilakukan oleh pemilik yang mengalami trauma adalah menunggu pampasan daripada Negari adalah tidak mencukupi dan lebih-lebih lagi apabila Negeri mempunyai laluan keluar yang disahkan pada pajakan Negeri. Begitu juga, adalah menyalahi perlembagaan bagi sesebuah Negeri untuk memberikan mana-mana tanah HAAN tanpa bayaran pampasan. Perintah berikutan pembayaran pampasan oleh mahkamah tidak menjadikan tindakan Negari melucutkan tanah HAAN milik perayu tanpa bayaran pampasan sebagai tindakan berperlembagaan (lihat perenggan 130 & 137–138).]

Cases referred to

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2022] 2 MLJ 273; [2022] 3 CLJ 1, FC (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (refd)

Frazer v Walker and Others [1967] 1 All ER 649, PC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (folld)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289, CA (refd)
Mok Deng Chee v Yap See Hoi & Ors [1981] 2 MLJ 321, FC (refd)
Nikodemus ak Singai & 2 Ors v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors (Civil Appeal No 01(f)-32–10 of 2019(Q)) (unreported) (refd)
Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors [2010] MLJU 2212; [2010] 10 CLJ 383, HC (refd)
Nikodemus Anak Singgai v Sibu Slipway Sdn Bhd [2015] MLJU 646; [2016] 1 CLJ 618, HC (refd)
Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors [2013] 7 MLJ 755, HC (refd)
TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77, FC (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713; [2012] 3 CLJ 271, HC (refd)

Legislation referred to

Federal Constitution art 13
National Land Code s 92
Land Code (Cap 81) ss 4, 5, 5(3), (7), 6, 6A, 15(1), 28, 28(1), (2), (3), (4), 132, 197, First Schedule, Forms B, C

Appeal from: *Indranika Jaya Sdn Bhd v Nikodemus ak Singai & Ors* [2018] 11 MLJ 281 (High Court, Kuching)

Dominique Ng Kim Ho (with Berrylin Ng Phuay Lee and Cherishe Ng Phuay Hui) (Dominique Ng & Assoc) for the appellant.
Peter Hii Din Chiang (Loke, King, Goh and Partners) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This is yet another case where before the native customary rights ('NCR') over the land have been properly and legally surrendered or terminated or extinguished and compensation made, the Sarawak State and its agencies had issued a lease of the land to private companies. This judgment explores the rights of the natives under the Sarawak Land Code ('the SLC') vis a vis that of the new registered lessee when a proper survey of the land has not been completed and compensation paid to the natives affected before the issuance of a State lease title over the land.

[2] The situation here is especially grievous and disturbing as at the time the natives Iban in Nikodemus and others in a representative action filed the suit in 2007 in Suit No 22–208 of 2007-I in the High Court of Sabah and Sarawak at

Kuching ('Nikodemus' NCR 2007 Suit'), seeking a declaration from the High Court that they have NCR over the disputed land, the leases issued were provisional leases over the subject land and subsequently these were converted into final State leases before the High Court decided in the natives' favour.

[3] The Nikodemus' NCR 2007 Suit is different from and yet very much related to the current Suit No KCH-23NCvC-1/2 of 2016 in the High Court of Sabah and Sarawak at Kuching ('Indranika Jaya's Trepass 2016 Suit'), essentially a suit for damages for trespass brought by Indranika Jaya Sdn Bhd ('Indranika Jaya') against Nikodemus and others, against which decision in favour of Indranika Jaya the natives in Nikodemus and others had appealed to this court.

[4] To understand the under-currents and overtones of this appeal, one would need to appreciate the issues that first arose in the Nikodemus' NCR 2007 Suit which spilled over to the Indranika Jaya's Trespass 2016 Suit against the backdrop of a supervening legislative amendment effected by the Sarawak Land Code (Amendment) Ordinance of 2018 which came into force on 1 August 2019. So, wade through the waters we must.

[5] The disputed land was at and around Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Ili at Gedong in the district of Simunjan, Sarawak, measuring some 8,001 hectares.

[6] There were initially six defendants in the Nikodemus' NCR 2007 Suit where Nikodemus and others sued in a representative capacity representing the Iban natives against the defendants in the following order from the first to the sixth defendants:

(a) Sibu Slipway Sdn Bhd — the holder of Forest License No 8393;

(b) Limbang Sinai Mas Sdn Bhd — the holder of two leases described as Lot 226 Block 4 Sedilu-Gedong Land District and Lot 1 Block 9 Sedilu-Gedong Land District;

(c) Indranika Jaya Sdn Bhd — the holder of a provisional lease described as Lots 164, 162 and 173 of Sedilu-Gedong Land District;

(d) the Superintendent of Lands and Surveys;

(e) the Director of Forest; and

(f) the Sarawak State Government.

[7] The natives, in the Nikodemus NCR 2007 Suit, sought reliefs of various declarations inter alia that they have NCR over the disputed land in question and that the alienation of the disputed land to the companies named in the suit

and, in particular for the purpose of this appeal, to Indranika Jaya, is unlawful and that the issuance of the provisional leases are unlawful and null and void and that the relevant entries of the registration of the subject land in the company's name be expunged.

[8] The Government of Sarawak and its agents were aware of the pending Nikodemus' NCR 2007 Suit as they were named as defendants and they even applied for the Suit to be struck out but was unsuccessful. However, the private entities who were granted either a forest license (as in the first defendant) or a provisional lease (as in thesecond and third defendants) applied successfully for the suit to be struck out.

[9] The decision is reported in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383 ('*Nikodemus 1* case'), a decision of Justice Rhodzariah Bujang with respect to the applications filed by all the defendants, which are the three companies and the Sarawak State and its agencies, to strike out the suit.

[10] Based on the fact that the titles issued to the private companies or forest licence as the case may be, are indefeasible, the High Court allowed Indranika Jaya and the two other companies to strike out the suit against them.

[11] With that the natives in Nikodemus and others in a representative action were left to pursue against the fourth to the sixth defendants who were the Superintendent of Lands and Surveys, the Director of Forest and the Sarawak State Government respectively.

[12] The Nikodemus' NCR 2007 Suit went for trial with witnesses being called and at the end of the trial, on the strength of the evidence presented, including expert evidence, Justice Lee Heng Cheong J (now JCA) held on 11 August 2014 that the plaintiffs as natives of the land, have NCR over the disputed land in question in that they had successfully proved that they had acquired, created and/or inherited NCR over the disputed land prior to 1 January 1958 over an area of 8,001 hectares. These are the areas over which forest timber license had been issued and leases had been issued. See the reported judgment in *Nikodemus Anak Singgai v Sibu Slipway Sdn Bhd* [2015] MLJU 646; [2016] 1 CLJ 618 ('*Nikodemus 2* case').

[13] As Justice Rhodzariah J (now FCJ) had earlier in the *Nikodemus 1* case struck out the suit against the first to the third defendants in the Nikodemus' NCR 2007 Suit including against Indranika Jaya as the third defendant there, Justice Lee Heng Cheong, upon clarification with the parties, then made an order on 10 September 2014 for assessment of damages over the whole of the 8,001 hectares over which both the timber licence and the State leases had been

issued, for the natives had lost their NCR over the disputed land for which provisional leases had been granted. His Lordship also deleted an earlier order made in declaring that the issuance of the forest license and the issuance of the provisional leases over the land was null and void.

[14] On appeal by the Government of the State of Sarawak and its agencies in the fourth to the fifth defendants in the Nikodemus' NCR 2007 Suit to the Court of Appeal, the Court of Appeal reduced the area over which the natives have NCR over the disputed land to just 300 hectares of cultivated mosaic which is the agreed *temuda*. This is because the Court of Appeal was bound by the decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 (FC) ('TR Sandah 1') that had held that the areas held under *Pemakai Menoa* and *Pulau Galau* do not constitute land held under NCR.

[15] By the time the appeal reached the Federal Court in Federal Court Civil Appeal No 01(f)-32–10 of 2019(Q) between *Nikodemus ak Singai & 2 Ors v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors* (Civil Appeal No 01(f)-32–10 of 2019(Q)) (unreported) ('the Nikodemus FC NCR Appeal') and which concerns the same disputed land, there had come into force the Sarawak Land Code (Amendment) Ordinance 2018 ('SLC 2018 Amendments'). The SLC 2018 Amendments which came into effect on 1 August 2019 recognise the customary practice of *Pemakai Menoa* and *Pulau Galau* and reinstated it as part of the customary law that the court would give effect to.

[16] The Federal Court, in a special panel constituted and chaired by Justice Abang Iskandar bin Abang Hashim CJ (Sabah and Sarawak), heard the *Nikodemus FC NCR Appeal* together with five other appeals as follows:

(a) 01(f)-31–10 of 2019(Q) — *Busing ak Jali & Ors v Government of Sarawak & Anor*;

(b) 01(f)-32–10 of 2019(Q) — *Nikodemus ak Singai & Ors v Superintendent of Lands & Surveys & Ors*;

(c) 01(i)-33–10 of 2019(Q) — *Ramba ak Bungkong & Ors v Unus bin Tambi & Ors*;

(d) 02(f)-76–10 of 2019(Q) — *Yahya bin Timbon & Ors v Kumpulan Parabena Sdn Bhd*;

(e) 02(f)-77–10 of 2019(Q) — *Busing ak Jali & Ors v Empire Plantation Sdn Bhd*; and

(f) 02(i)-79–10 of 2019(Q) — *Ramba ak Bungkong & Ors v ASCO Green Sdn Bhd*.

[17] The combined decisions were delivered on 24 November 2021 and reported in the case of *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273; [2022] 3 CLJ 1 ('*Busing Jali*'s FC case') and the Nikodemus FC NCR Appeal was referred to as Case B in the judgment.

[18] The common issues were whether the Federal Court's decision in *TR Sandah* case in respect of *Pemakai Menoa* and *Pulau Galau* is still good law and also with respect to *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 ('*TR Nyutan*'s case') on indefeasibility of provisional leases vis a vis NCR over the land.

[19] The Federal Court in *Busing Jali*'s FC case held that effect must be given to the statutory recognition of *Pemakai Menoa* and *Pulau Galau* for all pending cases before the courts unless they had been disposed of in the apex court before 1 August 2019. The Federal Court also held as follows:

> [162] Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts, such that the severance of 300 hectares of Temuda from the claimed 8001 hectares was based on *TR Sandah 1*. As stated earlier, the Court of Appeal was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*.
>
> [163] However, with the coming into force of s 6A, we are of the view that this appeal ought to be *sent back to the Court of Appeal for a finding of fact specifically on the area where Pemakai Menoa and Pulau Galau are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of Pemakai Menoa and Pulau Galau accordingly as allowed under s 6A. Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties.* (Emphasis added.)

[20] As at the decision of the Federal Court in *Busing Jali*'s FC case on 24 November 2021, no damages had been assessed and paid to the natives under the representative action arising out of the Nikodemus' NCR 2007 Suit. In fact, the Federal Court ordered the matter to be remitted to the Court of Appeal for determining the affected area and an assessment of damages arising out of that. The Federal Court observed as follows:

> [164] Undoubtedly, the Federal Court can and is legally entitled to make such assessment, however, by doing so, the parties are deprived of an avenue to appeal further on the matter of assessment.

[21] Meanwhile Indranika Jaya has entered into possession of the subject land upon being issued with a title in 2003 and had planted and cultivated an oil palm plantation on the subject land and which has been bearing fruits for several years. After the decision of Justice Lee Heng Cheong in the Nikodemus' NCR 2007 Suit on 11 August 2014, the defendants here, being the natives who as plaintiffs had succeeded in obtaining a declaration that they have NCR over the disputed land, entered upon the subject land and it was alleged that they sought to blockade the lorries from entering and exiting the oil palm plantation. The natives maintained that they have a right to remain on the subject land as they have NCR over the whole of the disputed land which includes the subject land and which NCR had not been properly terminated nor has it been extinguished and as yet, there has been no assessment of damages paid to them.

[22] Indranika Jaya filed this suit, the Indranika Jaya's Trespass 2016 Suit, claiming damages for trespass and an injunction restraining the natives from blocking the lorries from so entering and exiting the oil palm plantations and from trespassing onto the subject land. The injunction was granted pending the disposal of the suit and after the disposal of the suit Justice Dr Lim Hock Leng JC (now J) on 26 June 2018 awarded nominal damages for trespass of RM20,000 and interest thereon at the rate of 5%pa from the date of judgment to the date of full payment, and costs of RM30,000 subject to payment of the allocatur fee.

[23] A permanent prohibitory injunction was also given after the trial and the learned judge observed as follows:

> [99] The evidence is overwhelming that the defendants and their 60–70 followers have trespassed onto the plaintiff's subject land. *It appears that the defendants are still trying to assert proprietary rights over the subject land although there is no appeal against the decision in the High Court on 18 January 2010 by which the plaintiff's titles were held to be indefeasible*. The notice of motion for leave to appeal to the Federal Court, as explained earlier, does not concern the decision of the High Court on 18 January 2010. There is no lawful justification for the presence of the defendants and their followers on the subject land between 29 January to 6 February 2016, to which the plaintiff did not give consent and to which it objected.
>
> [100] The defendants have not given up their claim of proprietary rights and assert through DWS-1 and their counsel that the claim is still a live issue in the Federal Court, although that is clearly not the case. It appears that the defendants will continue to trespass onto the plaintiff's subject land as they throughout the trial maintained that they had existing farms there. Further, PW1 gave evidence that the defendants had returned to the plaintiff's subject land after 6 February 2016. (Emphasis added.)

[24] Justice Dr Lim Hock Leng above seemed to have taken the stand that as

Indranika Jaya's titles on the subject land are indefeasible, that trumps and triumphs over whatever may be the natives' NCR over the same subject land. There seemed to have been some miscommunication on pursuing the appeal from Justice Rhodzariah's decision in *Nikodemus 1* case in striking out the Nikodemus' NCR 2007 Suit against Indranika Jaya and two other private entities. The long and short of it was that there was no valid appeal from that decision to the Court of Appeal as a subsequent application filed to extend the time to appeal had been dismissed.

[25] Justice Dr Lim Hock Leng did not seem to have considered if a claim for trespass against the natives by Indranika Jaya could be maintained when the natives had been legally and validly occupying their ancestral land even before 1 January 1958 and as vindicated by Justice Lee Heng Cheong in the Nikodemus NCR 2007 Suit's decision handed down in 2014 in *Nikodemus 2* case.

[26] The issue of whether the natives' beneficial interest in their NCR over the subject land could exist side by side with Indranika Jaya's leasehold interest in the registered leases was not considered by the High Court below. Likewise, whether and when the natives' NCR over the subject land had been surrendered, terminated or extinguished did not feature at all in His Lordship's grounds of judgment against the backdrop of assessment of damages not having been done and much less, paid to the natives. In our considered view these would be relevant and pertinent issues in what appear to be a contestations of interests in the subject land by two parties; the natives who had acquired NCR in perpetuity over the subject land even before a provisional lease was issued to Indranika Jaya.

[27] Nikodemus and others have appealed to this court against the said decision of the High Court in the Indranika Jaya's Trespass Suit. This Court of Appeal in deciding the appeal has the benefit of insight and hindsight arising out of the Federal Court's case in *Busing Jali*'s FC case of which Nikodemus' NCR 2007 Suit was part of the decision at the Federal Court (referred to as Case B) and also the interpretation of ss 5, 6 and 6A of the SLC as amended by the Sarawak Land Code (Amendment) Ordinance 2018 which came into force on 1 August 2019 giving statutory footing to the customary practice of *Pemakai Menoa* and *Pulau Galau* with respect to NCR claims over land.

[28] The parties shall be referred to as the natives as appellants who were the defendants in the High Court below and Indranika Jaya as the respondent who was the plaintiff in the High Court below.

Whether the NCR of the appellant over the land may co-exist with the interest of the registered lessee in the provisional lease and later State lease pending a final survey and subject to the special conditions endorsed on the title

[29] At the time when Nikodemus filed his claim in a representative capacity in the Nikodemus' NCR 2007 Suit in the High Court, only provisional leases had been issued. See para [1] of *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383 as found by Justice Rhodzariah JC (now FCJ). The subject land in the provisional lease issued to Indranika Jaya and held under provisional lease 1229 measuring approximately 1,717 hectares was issued on 8 September 2003 for a premium of RM858,500 by way of ten instalment annual payments. The lease was for 60 years. A charge was created over it in favour of CIMB Islamic Bank Bhd for RM26,826,062.96 on 29 November 2007.

[30] It is not disputed that the subject land in the Indranika Jaya's Trespass 2016 Suit was later held under three provisional leases and subsequently converted to three State leases in 2009 are the same pieces of land which form part of the disputed land, in the Nikodemus' NCR 2007 Suit.

[31] Being a provisional lease, it was subject to the following 'RESTRICTIONS AND SPECIAL CONDITIONS' endorsed on the title:

> (i) Upon the completion of a proper survey of the land the holder of this provisional lease will be given a lease in accordance with the provisions of the Land Code and subject to the following express conditions and restrictions:
>
> (a) ...
>
> ...
>
> (d) The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but *only to such an area as the survey shows to be available.* (Emphasis added.)

[32] Subsequently the following provisional leases were issued on 14 March 2008 in place of provisional lease 1229 and they are Lot 164 Block 10, Lot 162 Block 10 and Lot 173 Block 16 of Sedilu-Gedong Land District.

[33] Lot 162 of approximately 69.1 hectares had a premium of RM25,141.80 payable in five equal annual instalments payments.

[34] The premium for Lot 164 of approximately 1,563 hectares was stated to be RM568,692.20 payable in five equal annual instalments payments.

[35] Lot 173 of approximately 67.6 hectares has a premium of RM24,596 also payable in five equal annual instalments payments.

[36] The charge in favour of CIMB Islamic created on 29 November 2007 was also reflected on the three provisional leases.

[37] Likewise the 'RESTRICTIONS AND SPECIAL CONDITIONS' in the continuation provisional lease of State Land in the three provisional leases has the following endorsed on the titles:

> (i) Upon the completion of a proper survey of the land the holder of this provisional lease will be given a lease in accordance with the provisions of the Land Code and subject to the following express conditions and restrictions:
>
> (a) ...
>
> ...
>
> (iii) The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but *only to such an area as the survey shows to be available.* (Emphasis added.)

[38] This is consistent with and indeed is required under s 28 of the SLC and in particular s 28(1), (2) and (3) as follows:

> Section 28 Survey required before alienation.
>
> (1) No State land shall be alienated under this Code *unless and until the survey of the land has been completed to the satisfaction of the Superintendent:*
>
> Provided that, when the immediate survey of any State land is impracticable, the Superintendent may order that a provisional lease in Form C in the First Schedule be executed in favour of the person entitled.
>
> (2) Every provisional lease shall specify the approximate extent and area of the land included therein but *shall not entitle the holder to a grant or lease of the whole of the area specified*.
>
> (3) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease *shall have no right to registration of a lease in Form B in the First Schedule for an area equal to the area stated to be alienated if on survey such area is found not to be available*. (Emphasis added.)

[39] The amended s 28 of the SLC amended by the Sarawak Land Code (Amendment) Ordinance 2018 reads as follows:

> 28 Survey required before alienation
>
> (1) No State land shall be alienated under this Code *unless and until the survey of the land has been completed to the satisfaction of the Superintendent*:
>
> Provided that, when the immediate survey of any State land is impracticable, the Superintendent may order that *a provisional lease in Form C in the First Schedule* be executed in favour of the person entitled.
>
> (2) Every provisional lease shall specify —
>
> (a) the approximate area of the land to be held thereunder;

(b) the annual rent payable;

(c) the period or term of the provisional lease;

(d) *the special conditions imposed thereon by the Superintendent*

(e) *that any land held under native customary rights created under section 5 or native territorial domain under section 6A shall be excluded from the area covered by the provisional lease*; and

(f) that the term for the lease issued after the survey under subsection (1) has been completed, shall be for the remainder of the term or period stated in the provisional lease.

(3) Notwithstanding the payment by him of any annual rent in respect of the area specified in the provisional lease, *the registered proprietor thereof shall not be entitled to the registration of a lease in Form B in the First Schedule for an area equal to the area specified in the provisional lease* if upon completion of the survey referred to in subsection (1) *any such area is unavailable for reason that —*

(a) *the land is already held under native customary rights created in accordance with section 5 or native territorial domain under section 6A; or*

(b) the land is required for any of the purposes as stated in section 46.

(4) *Until the survey required under subsection (1) has been completed and a lease in Form B of the First Schedule has been registered in the name of the registered proprietor, the provisions of section 132(1) shall not apply to a provisional lease.*

(5) Save as provided in subsection (4) all other provisions of this Code affecting leases or documents of title shall apply equally to provisional leases and references to a lease or document of title shall include a provisional lease. (Emphasis added.)

[Sub. Cap. A179/2019.]

[40] Indeed the format and express words in the provisional lease as provided for in Form C of the First Schedule reads:

... whereas a lease in accordance with the provisions of the Land Code, *cannot be given because the immediate survey of the land has not yet been practicable* now therefore I, the said Superintendent, hereby agree to the said ... *entering into possession of the said land and holding it as tenant* from the ... day of 19 ... subject to the payment therefor of the annual rent of ringgit ... or to the payment of such revised rent as may hereafter be determined under section 30 of the Land Code, and subject also to the following terms and conditions:

(1) Upon the completion of a proper survey of the land the holder of this provisional lease will be given a lease in accordance with the provisions of the Land Code, and subject to the following express conditions and restrictions (including any modifications of implied conditions and restrictions) ...

(2) The term of years for which any such lease shall be granted shall be the balance then remaining of the term of ... years from the date of this provisional lease.

(3) *The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but only to such an area as the survey shows to be available*.

In witness whereof I the said Superintendent have hereunto set my hand and seal of ... (Emphasis added.)

[41] The SLC 2018 Amendments which came into force on 1 August 2019 makes explicit what was implicit in the unamended version of s 28 of the SLC. Generally, indefeasibility does not attach to provisional title. The old s 28(1) reads as follows with respect to land which survey has not been completed:

Section 28 Survey required before alienation.

(1) *No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent*:

Provided that, when the immediate survey of any State land is impracticable, the Superintendent may order that a provisional lease in Form C in the First Schedule be executed in favour of the person entitled. (Emphasis added.)

[42] Before the decision to strike out the suit by Nikodemus and others against the first defendant to the third defendant was delivered on 18 January 2010, the final State leases had been issued to Indranika Jaya on 12 October 2009 corresponding to the three provisional leases as follows:

(a) Lot 160 Block 10 (carried from Lot 162, Block 10);

(b) Lot 159 Block 19 (carried from Lot 164, Block 10); and

(c) Lot 157 Block 16 (carried from Lot 173, Block 16), all of Sedilu-Geong Land District.

[43] Under the 'RESTRICTIONS AND SPECIAL CONDITIONS' for all the three 'Lease of State Land' titles, were endorsed with the following:

(iv) The lessee shall not be entitled to a lease for an area equal to the area stated to be alienated if, *upon completion of a survey, such an area is not found to be available for any reason* including that required to implement local plan. (Emphasis added.)

[44] Generally a final State lease is not issued until a final survey is completed or done on the land. Here as may be surmised from the above 'RESTRICTIONS AND SPECIAL CONDITIONS' in (iv) above, the final survey still had not been completed and so one wonders why the rush to issue the final State lease title when even with the provisional leases Indranika Jaya had no issue monetising it and using it as a security for a loan of RM26,826,062.96 from CIMB Islamic Bank Bhd for which charge a was created on 29 November 2007.

[45] The three titles to the three provisional leases were issued on 14 March 2008 and the final State leases issued on 12 October 2009 even without the completion of a survey as disclosed in 'RESTRICTIONS AND SPECIAL CONDITIONS' (iv). Surely the State must avoid any perception that it was in a rush to speed up the issuance of a final State lease in prioritising commercial interest of private developers of the State leases to the often fragile and fragmented rights of the natives asserting their claim to NCR land over an amorphous area.

[46] As they say for some people, perception is reality. We are only raising questions that we are troubled by and as the State and its agencies are not before us in this appeal, we make no findings on why the State leases were issued before the Nikodemus' NCR 2007 Suit was concluded in the High Court with a finding that the disputed land is encumbered with NCR.

[47] We can only hope that no final State leases are issued in the future when, as it is, the case was still before the High Court for a determination of the natives' NCR over the disputed land. The 2018 SLC Amendments clarified the concept of deferred indefeasibility of title for provisional lease as the legislative response and assurance to the controversial issue of indefeasibility of title and the question of extinguishing NCR resulting from the decision of the Federal Court in *TR Nyutan* case. The Minister in charge in tabling the SLC 2018 Amendments highlighted as follows:

> The recent Federal Court case of *TR Nyutan & Others v TH Holdings & Others* (2017) also had adverse implications on native customary rights to land in Sarawak. The issue in *TR Nyutan* case involved claim of Native Customary rights within an area over which a Provisional Lease had been issued to a private company. The Court ruled that while claims of native customary rights are proven, the rightful claimants are only entitled to be paid compensation but could not claim back the land since the Provisional Lease was later registered as a lease in the Land Office, thereby conferring indefeasibility of title on the registered owner thereof.
>
> To address the problem arising from *TR Nyutan* case, the proposed amendment also introduces the principle of deferred indefeasibility for any Provisional Lease issued under Section 28 of Land Code. This amendment will further safeguard the interests of the natives over native customary rights land and rights over native territorial domain to ensure that land held under such rights of the natives would not be included in any area intended to be covered by a Provisional Lease.
>
> It is thus proposed that Section 28 of the Land Code be amended, so that upon completion of a final survey of the land covered by a Provisional Lease, land held by native customary rights or within a native territorial domain must be excluded from the Provisional Lease. In other words, *the Provisional Lease does not enjoy the statutory protection of the principle of indefeasibility of title under the Torrens Land System*, until and unless:
>
> (a) a final survey of the land to be alienated has been completed; and

(b) all land held by natives under native customary rights by virtue of Section 5 of the Land Code and/or land under a native territorial domain have been excluded. (Emphasis added.) (see paragraph [126] of *Busing Jali*'s FC case.

[48] The Minister might be forgiven for forgetting to remember that in the Nikodemus' NCR 2007 Suit, the State proceeded with all due diligence to issue final State leases in place of the provisional leases even when the case was already filed and pending in the High Court. More than that the State and its agencies tried to strike out the suit but were unsuccessful.

[49] The SLC 2018 Amendments would only be as good and as effective if the State can choose to restrain itself from issuing a final State lease when there are pending matters before the court. If the State chooses to succumb to unknown pressure then the SLC 2018 Amendments would be toothless and be for decorative purposes only.

[50] Even in the then unamended s 28(1) of the SLC, until and unless a final survey is completed to the satisfaction of the Superintendent, at most only a provisional lease may be issued. However, what we have in the final State leases is a hybrid lease — final and yet subject to a survey being completed. It appears to us to be a creature unknown in the SLC.

[51] As stated in the amended s 28(4) of the SLC it is unless and until both conditions are fulfilled ie that the final survey is completed to the satisfaction of the Superintendent and a State lease in Form B is issued that the title becomes indefeasible for otherwise the benefit of indefeasibility under s 132 of the SLC does not follow nor flow from what is essentially a provisional lease still since it is subject to the completion of the survey.

[52] It was unfortunate that the final title to the State lease of 60 years was quickly issued until it was difficult, if not impossible, to challenge the indefeasibility of the alienated leasehold land to Indranika Jaya or the subsequent charge to CIMB Islamic.

[53] With the amended s 28(4) of the SLC, we must remain optimistic and hopeful and we draw further inspiration from the Federal Court's observation in *Busing Jali*'s FC case as follows:

> [127] The 2018 amendments therefore *prohibit alienation of State land before a completion of a survey, which shall allow exclusion of NCR under s 5 or NTD under s 6A from the area covered by the provisional lease and denial of registration of a lease proper if the area is already held under NCR or NTD respectively.* Consequently, anyone holding a provisional lease shall not be entitled to an indefeasibility of title under s 132 of the SLC. (Emphasis added.)

[54] In fact even in this case, in spite of the issuance of a final State lease, there was no obstacle to rectifying what could not have been alienated for the 'RESTRICTIONS AND SPECIAL CONDITIONS' (iv) expressly allowed such an area to be excluded and excised off if it is not found to be available *for any reason*, which must include areas encumbered by NCR.

[55] We hear that Indranika Jaya is as clean and clear as a *tabula rasa* — no stain of any improper or oblique motive — other than an application for a State lease to be alienated for the purpose of the cultivation of oil palm.

[56] While there is profit to be made by any private enterprise being awarded a State lease for 60 years for use of the combined lease area of 1,699.7 hectares of agriculture land for the planting of oil palm, one would expect the State not to proceed to issue a final State lease until the matter is decided by the court for otherwise it would be at the expense of the natives whose very livelihood is inextricably tied to the land and whose claim in NCR over the land is already before the High Court for trial and decision.

[57] We appreciate that nothing is to stand in the way of the State's plan to develop its economy and more so when there is a presumption under s 5(7) of the SLC that:

> (7) Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, *it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights*. (Emphasis added.)
>
> [Ins. Cap. A42; Am. Cap. A59.]

[58] Cap A 42 came into force on 15 January 1997 and Cap A 59 came into force on 1 January 1999.

[59] It is of course a rebuttable presumption as indicated by the qualifying words 'until the contrary is proved' in s 5(7) of the SLC but one would have thought that as the State has a fiduciary duty to promote, protect and preserve NCR over native customary land, it would be farcical to proceed to issue final State lease titles for land which NCR claims by the natives are already before the court.

[60] Even though the State and its agencies are not before us in this appeal which does not involve them, we cannot help but make some observations without making any definitive findings; all these against the backdrop of Indranika Jaya strenuously stressing that they have no control over how the State and its agencies may want to process and proceed with their application for a lease of State Land.

[61] It is simple for the State to say that the worst that can happen if it is proved wrong in that there is actually NCR claims over the land for which final State lease titles have been issued, is merely to pay damages to be assessed. However, that must be viewed against the disruption and displacement of a whole native group whose forebears had before 1 January 1958 cultivated, foraged and lived on the land. There is the uncertainties and anxieties that come with such dispossession and displacement of a whole society.

[62] It is true that the Federal Court in *Busing Jali*'s FC case made an order for the Court of Appeal to determine the area under NCR for the disputed land and damages to be assessed under s 197 of the SLC. That section was more a concession made rather than a certified option arising out of genuine mistakes and not so much a 'mistake' that could easily have been avoided by not falling to the temptation to issue a final State lease when the matter is already before the court in the Nikodemus NCR 2007 Suit and even before a final survey is completed.

[63] Section 197 of the SLC reads as followed:

> 197 Compensation for loss
>
> Any person who is deprived of any land, or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

[64] The State may find assurance in the court merely ordering damages to be paid against the indefeasible interests acquired by the private enterprise and the financier bank for apparently, they are clueless of any assertion of NCR by the natives over the subject land. Their interest, it would seem, would be too sacrosanct to be tinkered with, having attained immunity from challenge by any third parties including the natives.

[65] As yet the damages have not been assessed and paid to the natives in this case and we do not know when it would be though this case was filed in 2007 and in the meantime Indranika Jaya had proceeded to plant oil palm and monetise the State leases with a loan of some RM26.8m from the bank with premiums to be paid to the State over five instalment payments annually. The natives meanwhile have been displaced and dispossessed from their source of livelihood. They have to fend for themselves for their NCR over the disputed land, including the subject land and their usufructuary rights have been taken away.

[66] Section 4 of the SLC defines 'usufructuary rights' as follows:

means the rights or privileges exercised or enjoyed by a native community over a native territorial domain to:

(a) forage for food, including fishing and hunting;

(b) enjoy such rights or privileges exercisable by a native community in a communal forest constituted under Part III of the Forests Ordinance, 2015 [Cap. 71]; or

(c) carry out such activities which are expressly authorized in the native communal title issued under section 6A(3) or a permit issued under section 10(3) but subject to the terms and conditions specified therein.

[67] The State may say that legally because of the presumption in its favour under s 5(7) of the SLC, it is perfectly entitled to proceed to issue a final State lease titles over the disputed land. However, the State's willingness to take such a risk may not be reconcilable with its fiduciary duties to uphold the rights of the natives under their NCR over the land.

[68] The nature of the State's fiduciary duties was explained by the Court of Appeal in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 ('*Sagong Tasi*'s case') as follows:

> [51] There is nothing startling in the trial judge holding the first and fourth defendants to be fiduciaries in public law. In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. *It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here.* At other times it is to be exercised for the general good of the nation as a whole, that is to say, in the public interest. *But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty*. (Emphasis added.)

[69] The Court of Appeal in *Sagong Tasi*'s case further declared as follows:

> [58] I have given this part of the case anxious consideration and have arrived at the conclusion that the learned judge erred in not holding against the first defendant in respect of the *ungazetted* portion of the land. In my judgment after having correctly held:
>
> (a) that the *plaintiffs' customary communal title attached itself to the first defendant's radical title*; and
>
> (b) that the first and fourth defendants were under a fiduciary duty 'to protect the welfare of the aborigines including their land rights, *the trial judge ought to have included the ungazetted area in question for purposes of*

compensating those settled there for the deprivation of their property rights.

[59] In my judgment, *it was open to the judge to have made a finding that the failure or neglect of the first defendant to gazette the area in question also amounted to a breach of fiduciary duty.* Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the *ungazetted* area. It was aware that so long as that area remained *ungazetted*, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-*gazettation* which is their fault in the first place. I am yet to see a clearer case of a party taking advantage of its own wrong. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the *ungazetted* area which is more clearly demarcated in the plan exh P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as the *gazetted* portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross-appeal must therefore be allowed. (Emphasis added.)

[70] In *Sagong Tasi*'s case the plaintiffs are the aboriginal peoples of the Temuan tribe and are the first peoples of the States of Malaya. They settled and built on the land in question in Bukit Tampoi, Dengkil and cultivated it with crops. They also exercised rights of usufruct over the surroundings in that they foraged and fished in that area.

[71] The first defendant is the State Government of Selangor. Under the National Land Code ('the NLC') it is the owner of all unalienated land within its geographical boundaries, including the land settled upon by the plaintiffs. As the acquiring body, the Selangor State Government in March 1996 acquired some 38,477 acres of land running through the *gazetted* aboriginal reserve, as well as other lands they customarily occupied. It was acquired for the purpose of the construction of a portion of a highway to the Kuala Lumpur International Airport. The second defendant, United Engineers (M) Bhd, was the contractor engaged to construct the highway. The third defendant, Lembaga Lebuhraya Malaysia (Malaysian Highway Authority), is a statutory body that supervised and executed the design construction and maintenance of the highway. The fourth defendant, the Federal Government, was the decision-maker in the construction of the highway.

[72] The Court of Appeal in *Sagong Tasi*'s case found the second and third

defendants liable for trespass even though the second and third defendants had argued that they were in lawful possession with the permission of the first and fourth defendant. This is what the Court of Appeal said:

> [62] So far as the second and third defendants are concerned, their complaint that they ought not to have been found guilty of trespass by the judge is utterly devoid of any merit. The land they entered upon was not theirs. They had no title to it. *If they were seeking to rely on any permission granted them by the first and/or fourth defendants, then that was equally worthless because these defendants were not the absolute owners of the land. They were only nominal owners of the radical title. The true beneficial owners were the plaintiffs and they had given no consent.* Accordingly, I would uphold the learned judge's finding of trespass against the second and third defendants. So far as the extent of the trespass is concerned, I would include, for the purpose of assessing damages under this head, the trespass committed upon those settled on the *ungazetted* green and yellow portions marked on the plan exh P1. (Emphasis added.)

[73] As the High Court, speaking through Justice Lee Heng Cheong, has held that the natives here have NCR over the subject land, it must mean that they did not enter upon the land illegally but that instead they are the true beneficial owners of the land under NCR though no physical communal title has been issued.

[74] Much like in cases of tenancy coupled with equity, by way of analogy, the equity in their beneficial interests in the NCR land can only be satisfied with payment of compensation which has not been paid in this case. See the Federal Court case of *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 at p 323 where it was held that:

> The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.
>
> In the development of our law this principle was recognised as long ago as 1916 in the case of *MPRL Karuppan Chetty v Suah Thian* (1916) 1 FMSLR 300. It was applied by Chang Min Tat J, as he then was, in *Devi v Francis* [1969] 2 MLJ 169 Finally it became a settled law as a result of decision of the Federal Court in *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 (FC), which decision was subsequently confirmed by the Privy Council (7) Its practical application was demonstrated in the decision of Syed Othman J, whose judgment was confirmed by the Federal Court in *Tan Swee Ho Company Limited v Ali Hussein Bros* [1980] 1 MLJ 89; [1980] 2 MLJ 16 and in the decision of Abdoolcader J in *Wong Yon Lin v Liew Tham Soon & Ors* [1980] 2 MLJ 99.

[75] A mere notice to terminate would generally not be sufficient and much less in a case where, as here, the High Court had held that the natives have NCR over the disputed land which is a statutory right recognised under the SLC

which gives the natives a licence in perpetuity to occupy and be in possession of the land to forage for food, to fish and to plant and build their homes and bury their dead.

[76] It goes without saying, like in those cases of tenancy coupled with equity, until the equity is satisfied, with a proper notice of termination and compensation paid, the registered proprietor cannot obtain vacant possession of the land and much less sue for trespass.

[77] If a beneficial interest cannot be terminated without payment of compensation, what more of statutorily recognised rights under the SLC for which there are clear express provisions to be followed for a proper surrender or termination or extinguishment of NCR over the disputed land. See ss 5 and 6 of the SLC.

[78] The word 'indefeasible' is not defined in the SLC nor in the NLC. The meaning of indefeasible was explained by the Privy Council in *Frazer v Walker and Others* [1967] 1 All ER 649 as 'immunity from attack by the adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys'. As Lord Wilberforce held in the Privy Council case at p 652 that 'indefeasibility':

> ... is a convenient description of *the immunity from attack by adverse claim to the land or interest* in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. *It does not involve that the registered proprietor is protected against any claim whatsoever* ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; *but as registered proprietor, and while he remains such, no adverse claims (except as specifically admitted) may be brought against him*. (Emphasis added.)

[79] What it means is that one's title or interest is immune from attack by third parties. It does not correspondingly mean that one can maintain a cause of action in trespass against a third party on one's land. That would very much depend on whether that third party had entered the land validly or whether his licence or tenancy or equitable interest or NCR over the subject land has been lawfully terminated or extinguished as the case may be.

[80] There is no statutory right to claim for trespass that flows from having an indefeasible interest on the land. The word 'trespass' does not appear and is not used in the SLC. An action in trespass is a common law action. NCR over land is statutorily recognised and more so when it has been proved in a court of law.

[81] Generally when one has a registered interest on land it would mean the following as may be seen by way of comparison with s 92 of the NLC when spoken of in terms of the rights of the holder of an indefeasible title or interest on the land as follows:

> 92 Indefeasibility of final title, and rights of dealing, etc.
>
> (1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.
>
> (2) *The rights exercisable* by any person or body to whom State land has been alienated under *final title* shall include the following:
>
> (a) the right (subject to the provisions of this Act and to any restriction in interest to which the land is for the time being subject) to subdivide or partition the land, or amalgamate it with other land, in accordance with the provisions of Chapters 1 to 3 of Part Nine;
>
> (b) the right (subject as aforesaid) to subdivide any building thereon in accordance with the provisions of Chapter 4 of Part Nine;
>
> (c) the right (subject as aforesaid) *to effect transfers, leases, charges, surrenders, and any other dealings permitted under Division IV*; and
>
> (d) the right (subject as aforesaid, and subject also to the provisions of his personal law and of any other law for the time being in force relating to the disposition or devolution of property on death) to dispose of the land, or any undivided share therein, by will. (Emphasis added.)

[82] There is no reason why the natives' NCR over the same subject land cannot co-exist or exist side by side with the registered lessee's leasehold interest which is itself subject to 'such an area is not found to be available for any reason' after the completion of the survey as endorsed in the State leases until compensation is paid to the natives.

[83] The registered lessee is entitled to deal with the lease by way of transfer or charge. Indeed, a charge had been created over all the three provisional leases on 29 November 2007 before the State leases were issued in 2009.

[84] As was found by the High Court after trial in the Nikodemus' NCR 2007 Suit, the natives have established and acquired their NCR over the land prior to 1 January 1958. The High Court having made that declaration, the court does not make the declaration in vain.

[85] The Federal Court in *TR Nyutan*'s case had no problem reconciling conceptually NCR over land subsisting and existing side by side the interest of a registered lessee when it explained as follows:

[39] For the reasons adumbrated above, we propose to answer the questions of law posed in the first and second defendants 'and in the interveners 'appeals in the following manner: The statutory provisions under s 132 of the Sarawak Land Code pertaining to indefeasibility of title remain applicable even if it can be shown that NCR had been created over land in the manner prescribed under the Sarawak Land Code. A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after NCR was asserted. Based on the facts, indefeasibility of title of the land prevails over a NCR claim. It is not a question of whether a claim for NCR overrides indefeasibility of title. *Both these legal concepts exist side by side.*

[40] It is our judgment that a NCR claim without title should not be put on a better footing with differential treatment (*Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766). *A claim for NCR and indefeasibility of title exist side by side. Based on the facts of this case, the disputed land were converted to registered entities even before the plaintiffs succeeded in their NCR claim.*

[41] In the absence of the vitiating factors under s 132 of the Sarawak Land Code, the first and second defendants 'rights as leaseholders, and *the first and second interveners as proprietors and the third intervener as chargee cannot be defeated by the plaintiffs*' NCR.

The third and fourth defendants' appeal

[42] We now address the third and fourth defendants 'appeal. Since it was our earlier finding (in the first and second defendants and the interveners appeals) *that indefeasibility of title and a claim for NCR exist side by side,* we must now consider the appropriate remedy for the plaintiffs in the instant case. Given that the issue of proof of the plaintiffs 'NCR is not an issue, we propose to only deal with the appropriate remedy for the infringement of the plaintiffs' rights'. (Emphasis added.)

[86] An NCR over the subject land may not defeat indefeasibility of the State lease but that does not mean that the holder of the State leases has been conferred an automatic right to claim for trespass over natives who have NCR over the subject land.

[87] The express restriction and special condition attached to the land as found in the final State lease is such that the indefeasibility of the lease is not absolute but qualified and in any event the natives have been found by the High Court to have been legally on the land even before 1 January 1958 and that they have not abandoned their NCR land.

[88] What that means is that, as both NCR and benefits of indefeasibility may exist side by side over the disputed land and more particularly the subject land for the discussion of this appeal on Indranika Jaya's Trespass 2016 Suit; neither can sue the other for trespass. It is a most uncomfortable co-existence because it was something that, if done properly by the State and agencies, should not have happened.

[89] As such this court is of the considered view that the lessee of the State lease, Indranika Jaya, cannot maintain an action for trespass against the natives who had been declared by the High Court in the Nikodemus' NCR 2007 Suit to have NCR over the subject land which rights were acquired earlier, even before 1 January 1958, than the lease interest of Indranika Jaya.

Whether the appellants' NCR over the subject land has been surrendered, terminated and extinguished under the law in the circumstances of this case

[90] The Federal Court allowed the natives' appeal and upheld the learned High Court judge's finding that the appellants had established NCR over their *Pemakai Menoa* and *Pulau Galau* over the disputed land as follows:

> [162] Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts, such that the severance of 300 hectares of Temuda from the claimed 8,001 hectares was based on *TR Sandah 1*. As stated earlier, the Court of Appeal was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*.
>
> [163] *However, with the coming into force of s 6A, we are of the view that this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where Pemakai Menoa and Pulau Galau are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of Pemakai Menoa and Pulau Galau accordingly as allowed under s 6A.* Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the Appellants who might have been deprived of their rights by reason of alienation of the lands to third parties.
>
> [164] Undoubtedly, the Federal Court can and is legally entitled to make such assessment, however, by doing so, the parties are deprived of an avenue to appeal further on the matter of assessment.
>
> ...
>
> [174] ... each party to bear their own cost ...
>
> [175] Mention date for case B ... at the Court of Appeal ... is fixed within 14 days from today.

[91] The answer to that question is best answered by asking when would the natives' NCR over the land be terminated and extinguished if the NCR land has been lawfully acquired by the State. As the High Court and finally the Federal Court have confirmed the appellants have NCR over the land, the proper procedure must be by following the procedure as laid down under s 5(3) of the SLC. Section 5 of the SLC reads:

> 5 Native customary rights
>
> (1) As from the first day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves

and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the first day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that

(i) until a document of title has been issued in respect thereof—

(a) no rent shall be charged by the Government on the land which shall continue to be State land; and

(b) any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and his rights over the land may, upon the date of coming into force of this paragraph, be inherited, acquired or purchased by or transferred or sold or disposed of to or dealt with another native; and

[Sub. Cap. A166]

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the first day of January, 1958.

(3)(a) Any native customary rights *may be extinguished by direction issued by the Minister* which shall be —

(i) *published in the Gazette* and *one newspaper* circulating in Sarawak; and

(ii) *exhibited at the notice board of the District Office for the area where the land,* over which such rights are to be extinguished is situated, and *on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government*:

Provided that where such rights are extinguished in pursuance of this section *compensation shall be paid to any person who can establish his claims to such rights* in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) *Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent*, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister

under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

[Sub. Cap. A42.]

(4)(a) *Any person who is dissatisfied with any decision made by the Superintendent* under subsection (3) on the ground that —

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent;

(ii) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty-one days from the date of receipt of the decision of the Superintendent, by notice in writing addressed to the Superintendent, *require the matter to be referred to arbitration* in accordance with section 212.

(b) Upon receipt of the notice of arbitration, *the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court*, pending the outcome of such arbitration proceedings.

[Sub. Cap. A42.]

(5) Subsection (3) shall apply whether the land over which the customary rights are exercised is required for a public purpose or the extinction of such rights is expedient for the purpose of facilitating alienation, but shall have no application to cases in which the Forests Ordinance [Cap. 126 (1958 Ed.)], the National Parks and Nature Reserves Ordinance, 1998 [Cap. 27], or any other written law, including Part V, makes other provision for the extinguishment thereof.

[Ins. Ord. No. 2/74.]

(5A) Any inheritance, acquisition, purchase, transfer, sale or disposal of or other dealing in land over which native customary rights subsist made or occurring prior to the date of coming into force of paragraph (i) of the proviso in subsection (2), and which —

(a) has not been invalidated or declared unlawful or null and void by a Court of competent jurisdiction; or

(b) is not the subject matter of any proceeding pending in such Court shall have effect as if such inheritance, acquisition, purchase, transfer, sale or disposal of or other dealing in land had been made or occurred pursuant to the provision thereof.

[Add. Cap. A166]

(6) The Majlis Mesyuarat Kerajaan Negeri may make rules for the assessment of compensation payable for extinguishment of native customary rights under this section and section 15.

[Am. Cap. A59.]

(7) Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights. (Emphasis added.)

[Ins. Cap. A42; Am. Cap. A59.]

[92] However since this had not been followed as the State and its agencies proceeded as if the disputed land is State land, only to be proved wrong up to the Federal Court, the question then is, if it had followed the proper procedure, when would the natives' NCR over the land be extinguished?

[93] Surely it cannot be that if the proper procedure had been followed then compensation must have been paid before the NCR are extinguished whereas if no proper procedure had been followed, the same NCR over the land is extinguished upon the court's order for compensation to be paid. That would be to create an anomaly and aberration where the State would gain more by not following the law on extinguishing NCR over land for the State can still collect the premium first by allowing private enterprises to pay it by instalments but to issue the final State lease over the NCR land as soon as possible even though there is a pending suit for a declaration on the status of the land before the courts and no final survey has been completed yet.

[94] That may result in injustice and as can be seen from the cases that have come before the courts in the contestations of rights between NCR and registered State lease, the courts have consistently held that it is too late to cry over spilt milk once the titles are registered in the private enterprise's name.

[95] We thus have this anomaly and a likely miscarriage of justice when the natives who had been dispossessed and deprived of their NCR over their native customary land are still not compensated whereas as in this case, even before 2007 when they filed their suit in court, the private enterprise has entered into possession of the land and cultivated it and reaped profits from it with the help of bank loans secured over the subject land in question.

[96] Such a state of affairs cannot be allowed to continue when the State itself suffers no sanction by disregarding the NCR over land claimed by the natives. It would be a case of if we are proved wrong in that the land is NCR land after all, then compensation will be paid as ordered by the court but not until then.

[97] There is no incentive for the State to wait for the court's decision in pending cases. The proper procedure under s 5(3) of the SLC is only for the State to follow if they are satisfied that it is NCR land to begin with and if they are not, they do not have to follow the way of notification to the parties affected, *gazette*, hearing those objecting to the extinguishment exercise and payment of compensation.

[98] It is further next to impossible for the natives to prove that the State is conniving with private enterprises to have prime land alienated for logging or agriculture purpose. Surely the State cannot be said to be acting in less than good faith merely because it chooses to rely on the presumption that all land is State Land and then should it be found to have misjudged the situation, all that it needs to do is to pay the natives compensation as may be assessed by the court.

[99] It is a predictable outcome which does not sanction the State in any way for not having followed the legally prescribed procedure under s 5(3) of the SLC to extinguish native customary land of its NCR.

[100] Unless and until all NCR lawfully created over State land have been surrendered or terminated or provisions for compensating those natives affected have been made, such land shall not be alienated as clearly declared under s 15(1) of the SLC as follows:

> 15 Protection of native customary rights
>
> (1) Without prejudice to sections 18 and 18A, *where native customary rights have been lawfully created over State land* and land which has been issued with native communal title under section 6A, *such land shall not be alienated* or be used for a public purpose *until all native customary rights have been surrendered or terminated or provision for compensating the persons entitled thereto have been made* in accordance with section 5(3) and (4).'(Emphasis added.)

[101] A State that does not make compensation to the natives but dispossessed them of their NCR over the land, even in a case that has been later vindicated by the court, would have committed an unlawful and illegal act and more than that an unconstitutional act.

[102] The constitutional protection of no acquisition without compensation is even more imperative for the natives who often have to battle with the State and its agencies and private enterprises in a David and Goliath battle, with only their sling and five stones picked perhaps from the river, in a case where they have been dispossessed and others have come to occupy their land.

[103] Article 13 of the Federal Constitution declared in comforting words the

adequate compensation that the State must be committed to as follows:

> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[104] The Federal Court in *TR Nyutan*'s case was fully conscious that compensation had not been paid to the affected natives, being Ibans, whose NCR land had been taken from them, when it held that payment of compensation has to be made if the alienation of the state land was to have the effect of extinguishing or infringing native rights as follows:

> [43] As stated earlier, learned state counsel appearing for the third and fourth defendants highlighted to us that in a situation *where the state land is encumbered by NCR, no alienation thereof shall take place, until all NCR have been surrendered or terminated or provision for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with* (*Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805). *However, if the alienation of the state land has the effect of extinguishing or infringing native rights, the government has to, in accordance with s 15 of the Sarawak Land Code, make payments of compensation to the affected natives. Section 15 of the Sarawak Land Code provides ...*
>
> ...
>
> [44] The above section is further safeguarded by s 5(3) and (4) of the Sarawak Land Code which provides: ...
>
> ...
>
> [45] Based on the foregoing, and looking at the scheme of the provisions of the Sarawak Land Code, the Code does provide statutory safeguards with regard to the extinguishment of native customary rights. It is crystal clear, from a reading of s 5(3) of the Sarawak Land Code, that *the customary rights may be extinguished, provided that compensation or alternative replacement land with the same rights is made available* to any person whose NCR are affected by the direction of the Minister. (Emphasis added.)

[105] Unless and until all the NCR over the land have been surrendered, terminated or extinguished, the NCR over the land subsist side by side the interest of the registered lessee over the same land. The Federal Court was careful to underscore that as follows:

> [39] ... A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after NCR was asserted. Based on the facts, indefeasibility of title of the land prevails over a NCR claim. It is not a question of whether a claim for NCR overrides indefeasibility of title. *Both these legal concepts exist side by side.*
>
> [40] ... *A claim for NCR and indefeasibility of title exist side by side. Based on the facts*

of this case, the disputed land were converted to registered entities even before the plaintiffs succeeded in their NCR claim.

[41] In the absence of the vitiating factors under s 132 of the Sarawak Land Code, the first and second defendants 'rights as leaseholders, and *the first and second interveners as proprietors and the third intervener as chargee cannot be defeated by the plaintiffs*' NCR.

The third and fourth defendants' appeal

[42] We now address the third and fourth defendants 'appeal. Since it was our earlier finding (in the first and second defendants and the interveners appeals) *that indefeasibility of title and a claim for NCR exist side by side,* we must now consider the appropriate remedy for the plaintiffs in the instant case. Given that the issue of proof of the plaintiffs 'NCR is not an issue, we propose to only deal with the appropriate remedy for the infringement of the plaintiffs 'rights'. (Emphasis added.)

[106] To begin with and as has been stated before, what had happened was something that should not have happened if the State had waited for the court to decide the pending declaration for NCR status over the disputed land. Having taken the risk of a court's decision which may be against its stand, the State cannot then say that it is just too bad that the natives who are declared to have NCR over the disputed land are now being sued by the registered lessee of the State lease for trespass.

[107] The registered lessee had derived their title from the State that had been found out not to have properly and lawfully extinguished all the NCR over the disputed land.

[108] In fact the State has pre-empted any claim against them from registered lessee with the following 'RESTRICTIONS AND SPECIAL CONDITIONS' endorsed on all the three 'Lease of State Land' titles as follows:

(iv) The lessee shall not be entitled to a lease for an area equal to the area stated to be alienated if, *upon completion of a survey, such an area is not found to be available for any reason* including that required to implement local plan. (Emphasis added.)

[109] The expression 'if ... such an area is not found to be available for any reason' would include its unavailability because the radical title of the State is found to be attached with NCR over the land. The State and its agencies would be able to tell the registered lessee that it had taken the lease for 60 years knowing full well the express 'restriction and special conditions' endorsed in capital letters on the State lease. So too the Bank that took a charge over the said three State leases.

[110] It was thus open to the Federal Court in *Busing Jali*'s FC case, if it had wanted to in the exercise of its discretion, order the land to revert to the State

with the NCR over the land intact and rightly recognised by the State. However, as the Federal Court had exercised its discretion to order damages to be assessed instead, then the only reasonable inference to be drawn is that unless and until damages in the form of compensation is paid, the NCR over the disputed land has not been extinguished such that Indranika Jaya cannot validly sue for trespass against the natives. Both rights, that of NCR and interest of a registered lessee, co-exist with each other, however unhappy and incongruent it may be, in a situation like this which should not have happened in the first place if the State had not jumped the gun in issuing a final State lease, albeit subject to a final survey to be done.

[111] Even if we were wrong as to the point in time when the natives' NCR over the disputed land has been extinguished, we would say that in the absence of an express declaration as to when the NCR over the land is extinguished, the earliest point in time for saying that it has been extinguished is when the Federal Court confirmed the order of the High Court for damages to be paid to the natives for until then both parties were still pursuing their appeals through until the Federal Court; the State and its agencies to the Court of Appeal and the natives to the Federal Court.

[112] Surely it cannot be that a decision has become final just because at the High Court it was in one's favour for in the Court of Appeal it may be reversed or varied and on further appeal to the apex court in the Federal Court, the rights of the parties are resolved once for all. It would be detrimental and unfair to the natives to take the date of extinguishment of their NCR to be anything earlier than the final disposal of their rights in the Federal Court.

[113] The important thing is that when the Indranika Jaya's Trespass 2016 Suit was before the High Court, the natives' NCR over the disputed land had not been extinguished with the result that both rights, subsisting and co-existing, Indranika Jaya would not be able to mount and maintain an action in trespass against the natives as defendants in the High Court below.

[114] The Federal Court in *Busing Jali*'s FC case said the SLC is silent on the effect of a title issued in disregard of NCR on the land. We realised that this is a vexed area of the law in cases where there are the innocent parties in the natives, the State and its agencies and the private enterprise now having an indefeasible title to the land.

[115] We do not read *Busing Jali*'s FC case as laying down the proposition that in every case the Court would have to say to the natives that it is too late for you to assert any NCR over the land and must be content with just awaiting compensation whilst the private enterprise had already monetised the land by using it as a security for loans.

[116] As the Federal Court in its decision has exercised its discretion that the area be determined by the Court of Appeal and that there be assessment of damages, the appellants would have to settle for that where their NCR over the subject land is concerned.

Whether the sum of RM20,000 assessed as nominal damages for trespass should be set aside in any event

[117] The learned High Court judge in Justice Dr Lim Hock Leng made a finding of fact as follows:

> [55] *The Plaintiff has not proven on the balance of probabilities that it has suffered losses as a result of* its plantation workers being prevented from harvesting FFB during the *trespass* period and from rotten FFB. The Plaintiff has failed to show a causal link between the Defendants 'trespass and the alleged losses, ...' (Emphasis added.)

[118] As we have already found that a cause of action in trespass cannot be had against the natives as they have NCR over the subject land subsisting and co-existing side by side the registered lease interest of Indranika Jaya as the lessee, it would mean that no liability can be found against the natives as defendants below for trespass.

[119] We would make reference to the same case as that referred to by Justice Dr Lim Hock Leng as follows:

> [83] In this regard, reference is made to *Guan Soon Tin Mining Company v Wong Fook Kum* [1969] 1 MLJ 99 where Ong Hock Thye FJ held:
>
> > The respondent, as plaintiff, of course had to discharge the burden of *proving both the fact and the amount of damages before he could recover*. *Where he succeeded in proving neither fact nor amount of damage he must lose the action* or, *if a right was infringed, he would recover only nominal damages.* Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. (Emphasis added.)

[120] Even assuming for a moment that we had been wrong, having found the losses not proved, or the fact of the loss not proved as stated in para [55] of the High Court's grounds of judgment in the Indranika Jaya's Trespass 2016 Suit, the proper order would have been to dismiss Indranika Jaya's claim for damages for trespass.

[121] The trespass if there was one was only for a period of eight days with no loss being proved. The learned High Court judge held as follows:

> [35] From the evidence, it would seem clear that the defendants and their 60–70 followers were trespassing on the subject land from 29 January 2016 (starting

between 6am and 2pm) to 6 February 2016 (early morning). That would mean the trespass took place over a period of about eight days. A

[122] His Lordship Justice Dr Lim Hock Leng decided the matter on 26 June 2018 probably without the benefit of the refinement of law as propounded by the Federal Court in *TR Nyutan*'s case which laid down the principle that conceptually NCR over the subject land may exist side by side the registered interest of the other. Though handed down on 13 October 2017, it was only reported in [2018] 1 MLJ 77, and did not appear to have been referred to the High Court by learned counsel and certainly not by the learned High Court judge in his grounds of judgment. B C

[123] There were no rights of Indranika Jaya that had been infringed seeing that the rights under the NCR of the natives exist side by side that of Indranika Jaya and no court as at the date of the alleged infringement had declared that the NCR over the subject land had been validly terminated or extinguished. D

[124] In the peculiar circumstances of the case where the NCR of the natives had not been properly terminated or extinguished by the State that took the stand that the subject land was not NCR land and now that they had been proved wrong finally in the Federal Court in *Busing Jali*'s FC case, we do not think any damages, even nominal damages, is justified. Had compensation been paid out to the natives or at least into court in a case of lawful termination and compulsory surrender of the natives' NCR over the subject land, it may be argued that they no longer could exercise any NCR over the subject land. E F

[125] Unless and until compensation is paid out and in the absence of a declaration as to when their NCR rights had been extinguished as the case trudges through the three tiers from the High Court, to the Court of Appeal and then to the Federal Court, any finding of trespass and an award of damages, even nominal, would aggravate the anomaly and aberration in the granting of a State lease before the NCR over the subject land has been lawfully surrendered, terminated or extinguished. G

Whether the injunction should nevertheless remain in the circumstances of the case H

[126] While the appellants' NCR over the land has not been lawfully surrendered, terminated or extinguished, it would nevertheless not be conducive for peace and the orderly conduct of business if the injunction granted is not continued as there might be a breach of the peace. I

[127] What the appellants suffer as a result of their NCR over the land not having been lawfully terminated and extinguished would have to be taken up in the damages claim against the State and its agencies and for at the same time

being deprived of being able to exercise their NCR over the land while waiting for compensation to be assessed and paid out. It is for the appellant to make out a case for exemplary damages if the State has no good reason not to wait for the decision of the High Court and instead, proceeded full-steam ahead even without a final survey being done, to speedily grant a final State lease, disregarding its own procedure as required under the law.

[128] To say that it is less than the ideal situation would be to put it too mildly for in fact it is most prejudicial to the natives for they are left high and dry, their source of livelihood being snuffed out while fighting for their NCR over their ancestral land. Meanwhile Indranika Jaya has already started to monetise the State lease with the loan taken of some RM26.8m and are beginning to harvest and process the oil palm fruits. The State would have received whatever is the premium to be paid by instalments and the annual rent on the there State leases.

[129] Indranika Jaya may well say that is the largesse of the State and that the natives have no right to be annoyed if the State chose to be generous in granting them a State lease to cultivate the subject land that can only contribute to economic growth and development in the State. No one is saying that the State cannot prioritise economic growth and the overall uplifting of the lives of the people but certainly it has to be done un an orderly manner and in compliance with the law and always and at all times, taking into consideration the plight of dispossession and deprivation of natives from the ancestral land to which their very existence is inextricably linked in the daily sustenance and support by Mother Earth.

Whether there may be circumstances where the court may declare a title issued to be null and void for non-compliance with the law by the State and its agencies

[130] There would be circumstances where the court would not shrink from declaring a title issued not in compliance with its own procedure is ultra vires the relevant Land Code. Such was the case in *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713 at p 725; [2012] 3 CLJ 271 at p 282 where Justice Prasad Abraham held as follows:

> [19] ... The issuing of a computerised title to the fourth defendant as a registered proprietor when the original title to the said land continued to be in possession of the plaintiff was ultra vires as it contravened the provisions of the National Land Code (Amendment Act 1992 (Act 832 of 1992) s 5A and the 14th Schedule therein and the same was a contravention of s 340(2)(c) of the National Land Code. It follows therefore any instrument executed by the director of the fourth defendant would be void and insufficient per se (see s 340(2)(b) NLC).

[131] The above dicta of Justice Prasad Abraham in the *Uptown* case must be understood in the context of what was a bizarre and mind-blowing circumstance where a registered proprietor of a piece of land may wake up one day, only to find that he has been deprived of his land in that his name is no longer in the Register Document of Title ('RDT') to his land. In other words, his name has been removed from the RDT and that the title is no longer his.

[132] In *Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors* [2013] 7 MLJ 755 where a Computer Printed Issue Document of Title ('IDT') was issued in the name of the first defendant despite the existence of Manual IDT in the name of the plaintiff, His Lordship Harmindar J (now FCJ) has no difficulty in holding that such a title is null and void and observed at p 769 as follows:

> [32] In the instant case, there were now two titles. Obviously, as noted earlier, the second title in the name of D1 ought not to have been issued. This much was conceded by DW10, giving evidence for D8–D12, that the original manual IDT in the plaintiff's possession was the valid title. He confirmed that the plaintiff ought to have been named as the proprietor of Lot 14942 in the SPTB. Learned senior federal counsel for D8–D12 candidly admitted in his submission that only the plaintiff had the valid title.
>
> [33] The issuance of the second title was without doubt *due to a grave failure by D8–D12 to adhere to the strict mandatory provisions set out in the 14th Schedule of the NLC. There was no notification to the plaintiff as proprietor of Lot 14942 to take delivery of the Computerized IDT in exchange for the manual IDT in the plaintiff's name and in its possession. There was also no cancellation or destruction of the manual IDT in the name and possession of the plaintiff proprietor. The plaintiff was never issued with the title in Computerized IDT in its name as a title in continuation as was required under the 14th Schedule*.
>
> [34] *The issuance of a Computerized IDT in the name of D1, being a breach of the provisions of the 14th Schedule, of the NLC, was ultra vires and unlawful.* Clearly, the plaintiff was deprived of its land in violation of art 13(1) of the Federal Constitution which states: 'No person shall be deprived of property save in accordance with law'. *It must follow that the IDT issued in the name of D1 was a nullity and void with the effect that any other instruments executed thereon must also be void and liable to be set aside at the instance of the rightful registered proprietor*.
>
> [35] I would also add for the avoidance of any doubt that in view of the void title at its inception subsequent bona fide purchasers for value cannot avail themselves to the protection as afforded by the proviso to sub-s (3) of s 340 of the NLC. Admittedly, this appears to go against the principle of the conclusiveness of the register of titles under the Malaysian Torrens System. However, as maintained earlier, *this was really a case of a clash of titles, the second of which was issued ultra vires the NLC rendering it unlawful. An unlawful title cannot provide the basis for conclusiveness*. (Emphasis added.)

[133] The matter gets trickier when it is a case of a claim of NCR over land which has not been issued with any communal title and the State is relying on

the presumption that it is State Land under s 5(7) of the SLC. It is now made very clear by the SLC 2018 Amendments that a provisional lease does not enjoy indefeasibility under s 132 of the SLC. Section 28(4) of the SLC provides as follows:

> (4) Until the survey required under subsection (1) has been completed and a lease in Form B of the First Schedule has been registered in the name of the registered proprietor, the provisions of section 132(1) shall not apply to a provisional lease.

[134] Even after the issuance of a final State lease as in this case, all the Lease titles are subject to the 'RESTRICTIONS AND SPECIAL CONDITIONS' that are enforced on the State leases. The only saving grace to issuing a final State lease even before the completion of a survey is that of condition (iv) of the 'RESTRICTIONS AND SPECIAL CONDITIONS' which reads:

> (iv) The lessee shall not be entitled to a lease for an area equal to the area stated to be alienated if, *upon completion of a survey, such an area is not found to be available for any reason* including that required to implement local plan. (Emphasis added.)

[135] No one should have to suffer the trauma and tragedy of waking up one day to find he has been stripped of registered proprietorship of his land and house built thereon all because some procedure with respect to the issuance of computerised land title has not been followed and he is still holding the issue document of title in his name!

[136] If city folks would invariably say that cannot and must not happen in a Torrens system of land registration where title is everything then it is no different for the natives who do not have a physical title to their NCR land but whose rights are recognised under the law, to wake up one day to forage for food and to fish in the rivers, only to find that their NCR land has been occupied by other private enterprises and upon further checking, to have found out, that State leases had already been issued and registered in the name of a private enterprise.

[137] To say in that circumstance that the title issued to a third party, being indefeasible, cannot be touched, tinkered with and much less impugned and rectified, and that all that the traumatised proprietor can do is to await compensation from the State would be cold comfort and more so when the State had an exit route endorsed on the State lease as above-stated.

[138] Likewise, it would be unconstitutional for a State to alienate any NCR land without payment of compensation. The subsequent order for payment of compensation by the court does not make the act of the State in depriving the appellant of their NCR land without payment of compensation a constitutional act. The State's decision to go ahead and issue a final State lease

when the case is pending before the court may well attract a claim for exemplary damages and more so in the context of breach of fiduciary duties owed by the State to its natives. See *Sagong Tasi*'s case at para [67].

[139] After all the State is committed, as it said it would, when tabling the 2018 Amendment Bill to the SLC, to preserve, protect and promote their NCR over their ancestral land, they being the more vulnerable members of our society who often would have no voice or whose voice may hardly be heard in the cacophony of voices from vested commercial interests.

DECISION

[140] The concept of indefeasibility has to be read harmoniously with the principle of NCR status over the subject land in that whilst there is nothing preventing Indranika Jaya as registered lessee from dealing with the land, they cannot sue for trespass as the natives as appellants had been there with lawful justification under their NCR over the subject land long before titles were issued to the respondent.

[141] Until and unless the NCR over the land has been extinguished with payment of compensation as damages, the NCR exists and co-exists side by side the interest of the respondent as registered lessee. One cannot sue the other for trespass.

[142] Where mutual co-existence is not possible because of past antecedents as in this case, the court would have to reluctantly maintain the prohibitory injunction for fear of the breach of peace for emotions may well run high when one is propelled to defend one's very right to remain and live on the land — fighting for one's very survival. Their very existence and survival is inextricably tied to and wrapped round the land.

[143] We therefore maintain the words in the prohibitory injunction and affirm it without prejudice to the rights of the appellants to apply for the necessary easement if they can so prove their need for it.

[144] We are of the considered view that the trial judge in the High Court had been plainly wrong in failing to consider that the natives' NCR over the subject land may exist side by side the registered leasehold interest of Indranika Jaya and more so when the NCR had not been properly and lawfully extinguished under the law.

[145] Following the principle of appellate intervention enunciated in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, we had therefore allowed the appellants'/defendants' appeal and set aside the

order of the High court for nominal damages of RM20,000 plus interest and costs of RM30,000. The cross-appeal of the respondent/plaintiff for damages for trespass was correspondingly and consequentially dismissed.

[146] We ordered costs of RM30,000 here and below to the appellants subject to allocator.

POSTSCRIPT

[147] To deprive the natives of their NCR over the land without compensation being paid to the natives whose forbears had been on the land under their system of customary laws long before anyone of us set foot on the soil, should be unheard of after nearly 60 years of statehood.

[148] We are conscious of the fact that money is only as useful as the thing you exchange it for. Of what use could they put the compensation sum to, as and when it is assessed and paid out to the natives? The lifestyle of the natives is such that they live off the land and are one with the land in a dynamic and balanced ecosystem that ensures the protection of the rich fauna and flora life of the jungle and forest. Who are we to say that our lifestyle is superior to theirs? Isn't the stature of statehood measured by how one treats the most vulnerable in society whose rights are protected both under the Federal and State Constitution and the SLC?

[149] We now have a system of land law where NCR land may be disregarded by the State under the presumption that all land without a title issued is State Land under s 5(7) of the SLC and a final title issued that is indefeasible to an enterprise, whether it be for them to log for timber, to plant and harvest oil palm or for any development. They can in turn charge the final titles to the bank for financing and immediately monetise the land alienated to them and all we can do is to say to the natives: 'Sorry but there is nothing else we can do other than to order damages to be paid to you. More than that you risk being sued for trespass if you continue to remain on the land. You must get out of the land now! We shall talk of compensation later'.

[150] There is something grievously wrong with the equation. There would be no incentive for the State to wait for the courts to adjudicate on pending claims before issuing a provisional lease or State lease to a third party. In fact, to speak of incentive for the State is a misnomer for the State is under a fiduciary duty to preserve, protect, promote and indeed to defend the rights of the indigenous and native people of the land against deprivation of their livelihood which is inextricably tied to the land.

[151] To be deprived of their NCR land is traumatic enough; to have to vacate the land without compensation or damages being paid as their case meanders its way through the process of the courts would be to rub salt on open wounds. The Malay proverb may resonate with us in describing the plight of the natives: 'Sudah jatuh ditimpa tangga' which translated literally would mean 'Having fallen, one is being hit by a falling ladder!'.

[152] In *Sagong Tasi*'s case the Court of Appeal expressed its ardent hope that the rights of the first people of this nation would not be seized from them and they be dispossessed of it in future in this wise:

> [69] ... But this is nevertheless a sad case. Sad, because of the treatment that the plaintiffs received in the hands of the defendants. Here you have a case where the very authority — the State — that is enjoined by the law to protect the aborigines turned upon them and permitted them to be treated in a most shoddy, cruel and oppressive manner. It is my earnest hope that an H episode such as this will never be repeated.

[153] Judging by the number of cases that have come before the courts, the contestations between NCR land and an indefeasibility of titles issued subsequently to private enterprises, we are not hopeful that this will be the last case after the SLC 2018 Amendments. We can only hope we are wrong.

Appellants' appeal allowed and respondent's cross-appeal dismissed.

Reported by Ahmad Ismail